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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ELLEN GALLAGHER,

Plaintiff and Respondent,

v.

UNION BANK, N.A.,

Defendant and Appellant.

D058896, D059838

(Super. Ct. No. 37-2010-00087129-  
CU-OR-CTL)

APPEALS from a judgment and postjudgment order of the Superior Court of San Diego County, Jay Bloom and Steven R. Denton, Judges. Reversed.

In this consolidated action, Union Bank, N.A. (Union Bank) appeals from a summary judgment in favor of plaintiff Ellen Gallagher on the lawsuit that she filed against Union Bank after it took steps to foreclose on her home. At issue is whether Union Bank has a valid security interest in Gallagher's home based on a deed of trust it obtained as a result of a home equity line of credit it extended to a prior owner, but which was not reconveyed in connection with a previous sale. The trial court granted summary

judgment in favor of Gallagher, determining that a payoff demand statement that Union Bank issued in connection with the previous sale served to extinguish Union Bank's security interest.

We conclude that Gallagher did not establish in her summary judgment that Union Bank lacks a valid security interest in Gallagher's home, and accordingly we reverse the judgment. We also consider and reject Union Bank's argument that the trial court abused its discretion by granting Gallagher's motion to quash relating to certain business record subpoenas served by Union Bank on third parties. Moreover, based on our reversal of the judgment, we also reverse the trial court's postjudgment order awarding attorney fees to Gallagher.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

David K. Maltin obtained four loans from Union Bank, three of which were secured by deeds of trust on a home in La Jolla (the Home).

Union Bank made the first loan in May 2001, apparently in connection with Maltin's purchase or refinancing of the Home. Specifically, Maltin borrowed \$658,125 from Union Bank secured by a recorded first deed of trust on the Home (the First Deed of Trust). Union Bank was the beneficiary of the deed of trust, and UnionBanCal Mortgage Corporation (UnionBanCal) was the trustee.

Union Bank's second loan to Maltin was in July 2001. The loan consisted of a \$150,000 home equity line of credit from Union Bank, secured by a recorded deed of trust on the Home (the Second Deed of Trust).

Union Bank made a third loan to Maltin in April 2002. That loan consisted of a home equity line of credit from Union Bank in the amount of \$250,000. It was secured by a recorded deed of trust on the Home (the Third Deed of Trust), and as with the two previous deeds of trust, Union Bank was the beneficiary and UnionBanCal was the trustee.

Union Bank's fourth loan to Maltin was a small business line of credit, secured through the filing of a UCC-1 financing statement rather than by a security interest in the Home (the Business Line of Credit). The record does not indicate the date on which Maltin obtained the Business Line of Credit or contain any documentation for that loan.

In late 2003, Maltin entered into an agreement to sell the Home to June E. Komar (the Maltin/Komar transaction). By that time, the Second Deed of Trust had been reconveyed and no outstanding balance existed on the Business Line of Credit. It appears to have been the parties' intention in the Maltin/Komar transaction to have UnionBanCal reconvey its security interest in the Home so that Komar could obtain title to the Home free and clear of any preexisting deeds of trust. Specifically, Komar borrowed \$1,000,000 to finance the purchase of the Home, and the escrow instructions from Komar's lender stated that it required title insurance insuring that it had obtained a first and superior deed of trust on the Home.

Chicago Title Company (Chicago Title) acted as title insurer for the Maltin/Komar transaction, and The Heritage Escrow Company (Heritage) acted as the escrow company.

As explained in deposition testimony by an employee of Chicago Title, the initial task of a title company assigned to a real estate sale transaction is to prepare a

preliminary title report reflecting the open or unpaid deeds of trust on the real property.

In this case, a preliminary title report prepared by Chicago Title identified the First Deed of Trust and the Third Deed of Trust as encumbering the Home. The loan numbers for the obligations secured by the First Deed of Trust and the Third Deed of Trust were set forth on the recorded deeds of trust.

As a next step toward ensuring that Komar obtained title to the Home free and clear of any preexisting deeds of trust, Heritage sent letters to Union Bank requesting that it issue payoff demand statements for the deeds of trust secured by the Home. Heritage's letters to Union Bank were sent pursuant to the procedure described in Civil Code section 2943. That statute describes a method for obtaining payoff demand statements from the beneficiary of a deed of trust as to the amount needed to pay off a secured obligation. Under the statute, an "entitled person," including an escrow holder such as Heritage, may make a written demand for a "payoff demand statement" from a beneficiary of a deed of trust (in this case Union Bank) "for the purpose of establishing the amount necessary to pay the obligation in full." (Civ. Code, § 2943, subds. (a)(4) & (5), (d)(1).) At the close of escrow, the amounts set forth in the payoff demand statements are disbursed to the beneficiary, and the trustee on the deed of trust records a reconveyance. (See Civ. Code, § 2941, subd. (b).)

Using this procedure, Heritage sent two letters to Union Bank on December 8, 2003, informing Union Bank that it was handling an escrow "which calls for payment in full of the Trust Deed you currently hold on the property being conveyed." The "property being conveyed" was identified in the letters as the Home, based on its address and legal

property description. The letters requested that Union Bank send a "demand" to Heritage and send a "signed Request for Full Reconveyance," the "Original Note" and the "Trust Deed" to Chicago Title. Both letters identified Maltin as the borrower, provided Matlin's social security number, and referred to an attachment that they described as a "Borrower's Authorization."

The difference between the two letters (other than that they were sent to different fax numbers at Union Bank) was the number listed as "Your Loan No." One of the letters identified the loan number for the loan secured by the First Deed of Trust. The second letter, however, referenced the loan number associated with the Business Line of Credit, although that loan was not secured by a deed of trust on the Home.

The source of the loan numbers that Heritage provided to Union Bank appears to be information supplied by Maltin when he filled out a form titled "Seller's Loan Information" for Heritage setting forth information on his existing loans. In filling out the form, Maltin provided the correct loan number for the First Deed of Trust in the space indicated on the form for "1st Trust Deed," but on the portion of the form for the "2nd Trust Deed" Maltin provided the loan number for the Business Line of Credit instead of the Third Deed of Trust.<sup>1</sup>

The record contains two documents sent by Union Bank in response to Heritage's two letters.

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<sup>1</sup> The parties dispute whether the "Borrower's Authorization" that the letters from Heritage identify as an attachment is the same document as the "Seller's Loan Information" form that appears in the record.

First, on December 11, 2003, Union Bank sent Chicago Title a document that it titled "Beneficiary's Demand." That document identified the loan number for the First Deed of Trust, the property address for the Home, the interest rate information, and the principal and interest balance along with the reconveyance fee, for a total payoff amount of \$410,691.57. Based on its contents, the document was apparently intended to comply with Heritage's request for a payoff demand statement for the loan secured by the First Deed of Trust (the First Deed of Trust payoff demand statement). The First Deed of Trust payoff demand statement provided that Union Bank "will instruct the trustee to record a full reconveyance unless contrary written instructions are received by [Union Bank] at the time of payoff." Also, implying that other documents, such as a request for reconveyance, may have been enclosed, the First Deed of Trust payoff demand statement provided: "In accordance with your request to prepay the above loan, you are authorized to use said documents provided you can pay us the sum of \$410,691.57 plus any additional interest due."<sup>2</sup> The First Deed of Trust payoff demand also stated, "Reconveyance will be forwarded upon receipt of payoff to County for recording."

Second, on December 11, 2003, Union Bank sent a document to Heritage titled "Beneficiary's Demand," which identified the loan number for the Business Line of Credit. That document set forth the address of the Home as the "Collateral Address,"

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<sup>2</sup> As we have described, Heritage's letters to Union Bank requested that Union Bank respond to *both* Heritage *and* Chicago Title, enclosing different documentation to each party. The record does not contain a response from Union Bank to *Heritage* concerning a payoff demand for the First Deed of Trust.

indicated that the loan was "a variable rate loan/line of credit," listed a zero balance for the principal and interest amounts, and indicated that a combined reconveyance fee and demand fee of \$81 would be required for the payoff of the loan (the \$81 payoff demand statement). The \$81 payoff demand statement also indicated that Union Bank "will instruct the Trustee to record a full reconveyance unless contrary written instructions are received by Union Bank at the time of payoff."<sup>3</sup>

The Maltin/Komar transaction closed at the end of December 2003, and a grant deed was recorded in favor of Komar on December 30, 2003. In connection with the closing of the Maltin/Komar transaction, Chicago Title prepared an escrow receipt and disbursement authorization form showing payments to Union Bank of approximately \$410,000 for the First Deed of Trust and an additional amount of \$81 corresponding to the amount set forth in the \$81 payoff demand statement. Chicago Title issued title insurance to Komar insuring free and clear title to the Home.<sup>4</sup>

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<sup>3</sup> Again, although Heritage instructed Union Bank to send payoff demand statements to *both* Heritage *and* Chicago Title, the only payoff demand statement contained in the record in the amount of \$81 or referencing the loan number for the Business Line of Credit is addressed to Heritage.

<sup>4</sup> We note that Chicago Title insured Komar's clear title to the Home in this case where the loan number in Union Bank's payoff demand statement did not match the loan secured by the Third Deed of Trust. Such conduct is inconsistent with the practice described in the deposition testimony of a Chicago Title employee, according to which a title officer reviews the payoff demand statements obtained by the escrow company, focusing on loan numbers, to determine whether they match the trust deeds identified on the preliminary title report.

On January 22, 2004, UnionBanCal recorded a full reconveyance of the First Deed of Trust.

Around the same time, on January 20, 2004, Union Bank issued a check to Maltin in the amount of \$81. The notation on the check states "Purchaser: Overpymt [*sic*]" and specifies the loan number for the Business Line of Credit. As described in a declaration by a Union Bank employee, "In January 2004, Union Bank discovered that since there was no deed of trust securing the [Business Line of Credit,] its request for fees associated with the anticipated reconveyance . . . was unnecessary . . .," and Union Bank "[a]ccordingly . . . issued a check in the sum of \$81 to Mr. Maltin to reimburse him for those fees previously received by Union Bank in connection with [the \$81 payoff demand statement]."

A little over a year later, in February 2005, Gallagher entered into a purchase agreement to buy the Home from Komar. First American Title Insurance Company, acting through its agent California Title Company (hereafter "First American") was Gallagher's title insurer for the transaction. Prior to the closing of the transaction, First American prepared a preliminary title report, which identified the Third Deed of Trust as an existing security interest on the Home in the amount of \$250,000. The preliminary title report stated, "Although we find no recorded reconveyance of record, we believe the obligation secured by said deed of trust may have been satisfied. We are attempting to obtain a letter of indemnity from another title company. However, no assurance is hereby made as to the same." Gallagher signed an acknowledgement of having received the preliminary title report.



On a form titled "Request for Information or Letter of Indemnity," First American sent an inquiry to Chicago Title on January 31, 2005, noting that it had found no indication of a reconveyance of the Third Deed of Trust in connection with the Matlin/Komar transaction, for which Chicago Title had acted as the title insurer. On February 2005, Chicago Title responded by returning the form to First American stamped with the statement: "By this stamp, Chicago Title does hereby indemnify you against loss by reason of your issuing a policy or policies of title insurance on land described in the Deed(s) of Trust contained in your request without exception to said Deed(s) of Trust."

The sale of the Home closed in due course, and Gallagher took title.

After he sold the Home to Komar in December 2003, Maltin continued to draw down on the home equity line of credit secured by the Third Deed of Trust. In December 2008, Maltin became delinquent on his payments to Union Bank and, in February 2009 Union Bank blocked the line of credit due to the delinquency. During its collection efforts, Union Bank realized that the Home had been sold, and in July 2009 it sent a letter to Gallagher stating that it would foreclose on the Home if she did not pay the amount of \$253,047.76 within 30 days. The letter explained that because the loan secured by the Third Deed of Trust was "not assumable" and the Home had been transferred, it was demanding payment in full of the loan balance. In November 2009, Union Bank recorded a notice of default and election to sell the Home based on a default on the loan secured by the Third Deed of Trust.

To protect the Home from foreclosure, Gallagher filed the instant lawsuit against Union Bank, asserting causes of action for (1) quiet title; (2) declaratory relief; and (3) slander of title, and also seeking preliminary and permanent injunctive relief. The trial court granted preliminary injunctive relief preventing the foreclosure and ordering that the notice of default be removed.

After litigation of a discovery dispute that we will discuss in detail later in this opinion, Gallagher filed a motion for summary judgment. Gallagher contended (1) that Union Bank's security interest in the Home was extinguished by operation of Civil Code section 2943 due to its provision of the \$81 payoff demand statement; (2) or, in the alternative, that Union Bank was equitably estopped from claiming a security interest in the Home.

The trial court granted summary judgment in favor of Gallagher, ruling that Union Bank's provision of the \$81 payoff demand statement served to extinguish its security interest in the Home under the Third Deed of Trust. The trial court ordered Union Bank to reconvey the Third Deed of Trust and entered judgment in favor of Gallagher.

In a postjudgment order, the trial court awarded attorney fees to Gallagher as the prevailing party pursuant to Civil Code section 1717, subdivision (a).

Union Bank filed separate notices of appeal from the judgment and from the order awarding attorney fees. We have consolidated those appeals, and we address them together in this opinion.

## II

### DISCUSSION

#### A. *The Trial Court Erred in Granting Summary Judgment in Favor of Gallagher*

##### 1. *Standards Applicable to Motions for Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment or summary adjudication is to be granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A plaintiff moving for summary judgment "bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) On summary judgment, when a plaintiff has met its initial burden of showing that each element has been proved, the burden shifts to the defendant "to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

We review summary judgment rulings de novo. (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) "[W]e are not bound by the trial court's stated reasons for its ruling on the motion; we review only the trial court's ruling and not its rationale." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1402.)

2. *The \$81 Payoff Demand Statement Did Not Extinguish the Third Deed of Trust Pursuant to Civil Code Section 2943*

We first consider Gallagher's argument that pursuant to Civil Code section 2943, Union Bank's provision of the \$81 payoff demand statement served to extinguish the security interest in the Home created by the Third Deed of Trust.

We begin our analysis by examining the relevant statutory provisions. As we have explained, Civil Code section 2943 sets forth a method by which an escrow holder, trustor or other "entitled person" may obtain a payoff demand statement setting forth the amount required to be paid as of that date to fully satisfy all obligations secured by a deed of trust. (§ 2943, subds. (a)(4) & (5), (c)(1).) The statute also provides a method for obtaining a "beneficiary statement" from the beneficiary of a deed of trust setting forth information about the secured obligation, such as the unpaid balance, amount of periodic payments, payment of taxes and the amount of hazard insurance. (§ 2943, subds. (a)(2), (b)(1).) Pursuant to section 2943, subdivision (d)(1), "[a] beneficiary statement [or] payoff demand statement . . . may be relied upon by the entitled person . . . in accordance with its terms, including with respect to the payoff demand statement . . . reliance for the purpose of establishing the amount necessary to pay the obligation in full." The statute further provides that upon the close of escrow, transfer of title, or recordation of a lien, "any sums that were due and for any reason not included in the statement . . . shall continue to be recoverable by the beneficiary as an unsecured obligation of the obligor pursuant to the terms of the note and existing provisions of law." (§ 2943, subd. (d)(3).)

Based on these statutory provisions, case law holds that "a beneficiary may look only to the obligor for any due but unpaid sums in the payoff of a secured loan where the underpayment was the result of the beneficiary's error in preparing the payoff demand statement." (*Freedom Financial Thrift & Loan v. Golden Pacific Bank* (1993) 20 Cal.App.4th 1305, 1313.) "'If the beneficiary makes an error in the Statement, any amounts which may be due which are not included in the Statement are not secured by the deed of trust or mortgage after the entitled person has changed his position in reliance on the Statement . . . .'" (*Cathay Bank v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 266, 271.) This is because Civil Code section 2943 is "intended to "'shift the responsibility for calculating the amount to satisfy the loan from the borrowers [trustor or mortgagor] to [the] creditor [mortgagee or beneficiary].'"'" (*Ibid.*) Thus, for instance, in *Cathay Bank*, a bank sent a payoff demand statement that understated by approximately \$60,000 the balance of the secured loan that was the subject of the escrow company's request. (*Id.* at p. 268.) The court held that upon close of escrow, based on section 2943, the balance of the loan not set forth by the bank in its payoff demand statement was no longer a secured obligation. (*Id.* at p. 271.)

Gallagher contends that the \$81 payoff demand statement was a payoff demand statement for the loan secured by the Third Deed of Trust, and that accordingly, upon close of escrow, Civil Code section 2943 operated to extinguish Union Bank's security interest created by the Third Deed of Trust. We disagree. As we will explain, Gallagher has not submitted evidence in connection with her summary judgment motion that is

sufficient to establish that Union Bank provided a payoff demand statement for the loan secured by the Third Deed of Trust.

The content of the \$81 payment demand statement is inconsistent with that document being a payoff demand statement for the loan secured by the Third Deed of Trust. Significantly, the \$81 payoff demand statement does not identify the loan number for the loan secured by the Third Deed of Trust. On the contrary, consistent with the information provided in Heritage's letter, the \$81 payoff demand statement identifies the Business Line of Credit. According to uncontradicted evidence submitted by Union Bank, the standard in the industry is for a lender to research the specific loan that has been identified when a request for a payoff demand statement is made, not to determine all of the secured loans that encumber the property. Deposition testimony from a Chicago Title employee implicitly acknowledges the importance of the loan numbers in payoff demand statements, explaining that title officers typically check payoff demands to make sure that the loan numbers correspond to those on the preliminary title report.

To support the contention that the \$81 payoff demand statement concerned the Third Deed of Trust, not the Business Line of Credit, Gallagher points to certain language in the \$81 payoff demand statement that is consistent with interpreting the document as referring to the reconveyance of a deed of trust. Specifically, the \$81 payoff demand statement refers to a "reconveyance fee" and states that Union Bank "will instruct the Trustee to record a full reconveyance unless contrary written instructions are received by Union Bank at the time of payoff." Gallagher also points out that the \$81 payoff demand was sent in response to Heritage's letter that stated it was handling an escrow "which calls

for payment in full of the Trust Deed you currently hold on the property being conveyed." In our view, these facts are not sufficient to establish that the \$81 payoff demand concerns the Third Deed of Trust, as the \$81 payoff demand statement plainly identifies the loan number for the Business Line of Credit as the obligation to which it pertains, and does not mention the loan number for the Third Deed of Trust.

In light of the facts in the record, we conclude that Gallagher has not met her burden on summary judgment to establish that the \$81 payoff demand constitutes a payoff demand statement for the loan secured by the Third Deed of Trust. Put simply, although Heritage may have *intended* to ask for a payoff demand statement for the loan secured by the Third Deed of Trust, it did not do so because it supplied the wrong loan number, i.e., the loan number for the Business Line of Credit. Following the industry standard of researching the specific loan identified by the escrow company, Union Bank responded in the \$81 payoff demand statement with information about the loan associated with the loan number supplied by Heritage. At no point did Union Bank refer to the loan secured by the Third Deed of Trust. Therefore, the \$81 payoff demand statement was not a payoff demand statement for the loan secured by the Third Deed of Trust.

Without further citation to authority, Gallagher relies on Civil Code section 2943, subdivision (a)(2)(G) to argue that even though Heritage provided the loan number for the Business Line of Credit in its request for a payoff demand statement, Heritage's request effectively asked Union Bank to also respond with payoff information for the loan secured by the Third Deed of Trust. The subdivision of section 2943 on which Gallagher relies states that a beneficiary statement should set forth "[t]he nature, and if

known, the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary which have become a lien on the real property involved." (§ 2943, subd. (a)(2)(G).) Gallagher's argument fails because the statutory language she cites applies only to beneficiary statements, not to payoff demand statements. Section 2943 makes a clear distinction between beneficiary statements and payoff demand statements. (§ 2943, subd. (a)(2) & (5).) Heritage's letter was a request for a payoff demand statement, as it explained that the escrow called for "payment in full" of the obligation it identified by loan number and requested that Union Bank send a "demand" for use by Heritage and Chicago Title. Indeed, if there was any ambiguity as to whether Heritage's letter was requesting a payoff demand statement or a beneficiary statement, the statute provides that in the event of an ambiguity in the type of statement requested, "the beneficiary shall treat the request as a request for a payoff demand statement." (Civ. Code, § 2943, subd. (e)(1).) Further, Union Bank's response was a payoff demand statement — not a beneficiary statement — as it twice referred to a "payoff" and was entitled "Beneficiary's *Demand*." (Italics added.)

Because Gallagher has not established that the \$81 payoff demand related to the loan secured by the Third Deed of Trust, she did not prevail in her summary judgment motion by establishing that Civil Code section 2943 operates to extinguish Union Bank's security interest under the Third Deed of Trust. Although section 2943, subdivision (d)(3) states that "any sums that were due and for any reason not included in the statement" become an unsecured obligation, that provision, by its own terms, applies only when there is a payoff demand statement *relating to the obligation and deed of trust*



*at issue*, and there is a mistake in the *amount* needed to pay off the obligation. That is not the case here because the \$81 payoff demand statement did not reference the loan secured by the Third Deed of Trust, and thus did not make a mistake about the amount needed to pay off that secured loan.

3. *Gallagher Did Not Establish That Union Bank Is Equitably Estopped from Claiming a Security Interest Under the Third Deed of Trust*

In the alternative, Gallagher argues that even if we determine that Civil Code section 2943 did not operate to extinguish Union Bank's security interest under the Third Deed of Trust, Union Bank should be equitably estopped from claiming that it still has a security interest.

"The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment." (*City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 279 (*Goleta*)). "A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. . . . There can be no estoppel if one of these elements is missing." (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584, citation omitted (*Simmons*)).

Gallagher's briefing does not clearly identify the material fact that Union Bank purportedly misrepresented or concealed. However, the logical extension of Gallagher's

argument is that Union Bank misrepresented or concealed the fact that the \$81 payoff demand statement related to the Business Line of Credit instead of to the obligation secured by the Third Deed of Trust. Gallagher's equitable estoppel argument fails because the evidence does not establish that Union Bank misrepresented or concealed the facts as to that issue. As we have explained, the \$81 payoff demand statement does not identify the obligation secured by the Third Deed of Trust, but instead it references the loan number for the Business Line of Credit, as did Heritage's request. Therefore, the \$81 payoff demand statement does not constitute a misrepresentation or concealment as to the fact that the \$81 payoff demand statement covers the Business Line of Credit rather than the obligation secured by the Third Deed of Trust.

Another problem with Gallagher's attempt to rely on the doctrine of equitable estoppel in her lawsuit against Union Bank is that she has submitted no evidence that any representation was made *to her* by Union Bank, or that she relied on any such representation. Any representations made by Union Bank were to Chicago Title and Heritage, not to Gallagher, but they are not parties to this lawsuit.

Further, even if Gallagher could establish equitable estoppel based on Union Bank's representations to Chicago Title and Heritage, Gallagher must prove that Union Bank *intentionally* led those parties to believe that the \$81 payoff demand statement related to the obligation secured by the Third Deed of Trust. (*Goleta, supra*, 40 Cal.4th at p. 279; *Simmons, supra*, 44 Cal.4th at p. 584.) Gallagher has not submitted evidence in connection with her summary judgment motion to compel a finding in her favor on that issue. Indeed, to the contrary, the evidence submitted by Union Bank supports a finding

that Union Bank intended to communicate information about the Business Line of Credit based on its standard practice of referring to the loan number provided in the escrow company's request.

In sum, Gallagher has not established that Civil Code section 2943 or principles of equitable estoppel apply to extinguish Union Bank's security interest in the Home under the Third Deed of Trust. Accordingly, the trial court erred in granting Gallagher's motion for summary judgment.<sup>5</sup>

B. *Because the Judgment Has Been Reversed, Gallagher Is Not Entitled to an Award of Attorney Fees*

Union Bank has also appealed from the trial court's postjudgment order awarding attorney fees to Gallagher in the amount of \$169,408.27. The award was made pursuant to Civil Code section 1717, subdivision (a) because Gallagher was the prevailing party in the litigation and therefore entitled to recover fees under a reciprocal application of the attorney fee provision in the Third Deed of Trust.

Union Bank bases its appeal of the attorney fee award on a legal argument that we need not reach here because we have reversed the judgment upon which the postjudgment award of attorney fees is based. In the absence of an underlying judgment,

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<sup>5</sup> We note that the appellate briefing also raises issues of estoppel in a different legal context, which we do not, and need not, reach in this opinion. Specifically, Union Bank points out it has alleged as an affirmative defense that Gallagher is estopped from obtaining relief in this lawsuit because she allegedly learned about Union Bank's security interest in the Home when she reviewed the preliminary title report prior to her purchase of the Home in 2005. Union Bank did not move for summary judgment on its affirmative defenses, and we express no view as to whether, on remand, Union Bank would be able to succeed on such a motion.

the attorney fee award must necessarily be reversed. (*Allen v. Smith* (2002) 94

Cal.App.4th 1270, 1284.)<sup>6</sup>

C. *The Trial Court Did Not Abuse Its Discretion in Granting Gallagher's Motion to Quash*

Finally, we consider Union Bank's challenge to the trial court's ruling on a motion to quash relating to subpoenas for the production of business records that it served on Chicago Title, California Title Company and First American.

Each of the subpoenas called for the production of "[a]ll documents which constitute, evidence, refer or relate to the agreement of Chicago Title to indemnify California Title Company in connection with the sale of [the Home]."

Gallagher filed a motion to quash the subpoenas to the extent they called for the production of "documents relating to Chicago Title's indemnity obligations subsequent to Union Bank instituting foreclosure proceedings against Ms. Gallagher." The motion to quash specified that "[t]he communications at issue here are emails and written correspondence among counsel for First American/Ms. Gallagher, and Chicago Title." Further, Gallagher's reply memorandum emphasized the "[t]he only documents withheld were emails and letters between attorneys for Ms. Gallagher and Chicago Title discussing the legal issues relating to Union Bank's lien and other legal analysis." Accordingly, as Gallagher explained, "the motion to quash relates solely to the emails and letters between

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<sup>6</sup> As it is not necessary to our resolution of the appeal of the attorney fee award, we deny Union Bank's request for judicial notice filed in connection with that appeal. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

counsel for Ms. Gallagher and Chicago Title discussing the legal analysis and defense strategy for dealing with Union Bank's asserted lien." Citing the "common interest doctrine" (see *OXY Resources California, LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 887-891 (*OXY Resources*)), the motion to quash argued that those communications were protected from disclosure.

In a declaration in support of the motion to quash, counsel for Gallagher stated that on behalf of Gallagher and First American, he had tendered Union Bank's claim to Chicago Title and demanded that Chicago Title fulfill its indemnity obligations to defend Gallagher's title against Union Bank's claim to a security interest. He explained that he had numerous communications with Chicago Title and its counsel relating to Gallagher's defense of her title and Chicago Title's obligation to defend indemnify First American and Gallagher. He stated that "[m]any of these communications involved defense or litigation strategy, including attorney work-product" and concerned the best way to defend Gallagher's title against Union Bank's claim.

Counsel for Chicago Title also filed a declaration. He stated that he had engaged in communications with counsel for Gallagher relating to the legal analysis of the issues concerning Union Bank's claim to a security interest in the Home and Chicago Title's indemnity and defense obligations. He explained that Chicago Title had agreed to defend and indemnify First American and Gallagher with respect to Union Bank's claims, and that the communications were necessary to facilitate Gallagher's defense against Union Bank's attempt to foreclose.

Union Bank opposed the motion to quash, arguing that the requirements of the common interest doctrine were not satisfied or that, at a minimum, the trial court should conduct an in camera review of the documents to determine whether they should be produced.

The trial court granted the motion to quash. It stated, "Communications between Chicago Title's indemnitees, their counsel and [Gallagher's] counsel regarding Chicago Title's indemnity obligations and legal issues relating to Union Bank's lien on [Gallagher's] property after Union Bank filed its Notice of Default on November 10, 2009 need not be produced. The attorney client privilege has not been waived. Plaintiff and these entities share a common goal of defending [Gallagher's] title."

"Appellate review of discovery rulings is governed by the abuse of discretion standard. . . . 'The trial court's determination will be set aside only when it has been demonstrated that there was "no legal justification" for the order granting or denying the discovery in question.'" (*OXY Resources, supra*, 115 Cal.App.4th at p. 887, citation omitted.)

Union Bank argues that the trial court abused its discretion because it misapplied the common interest doctrine. Under that doctrine, "parties who possess common legal interests may share privileged information without losing the protection afforded by the privilege. This principle operates as an exception to the general rule that a privilege is waived upon voluntary disclosure of the privileged information to a third party . . . ." (*OXY Resources, supra*, 115 Cal.App.4th at pp. 887-888.) "[T]he party seeking to invoke the doctrine must first establish that the communicated information would otherwise be

protected from disclosure by a claim of privilege" such as the attorney client privilege or attorney work product doctrine. (*Id.* at p. 890.) Second, "[f]or the common interest doctrine to attach, most courts seem to insist that the two parties have in common an interest in securing legal advice related to the same matter — and that the communications be made to advance their shared interest in securing legal advice on that common matter.'" (*Id.* at p. 891.)

Union Bank argues that the trial court improperly applied the common interest doctrine in two respects: (1) the trial court purportedly failed to acknowledge that the documents at issue must first be determined to be covered by an applicable privilege, and (2) even if the documents were covered by an applicable privilege, Chicago Title and First American/Gallagher did not satisfy the requirement for application of the common interest doctrine. As we will explain, neither contention has merit.

First, according to our review of the record, the trial court properly understood that the common interest doctrine does not create a privilege but instead functions to prevent waiver of an already existing privilege. As the trial court stated, because the parties involved in the communications share a common goal of defending Gallagher's title, the applicable privilege "has not been waived." Further, the record supports a determination that the documents at issue were protected by the attorney work product doctrine. Specifically, the subject documents qualified as attorney work product because, as described by counsels' declarations and in Gallagher's briefing of the motion, they discussed defense and litigation strategy and the legal issues surrounding Chicago Title's indemnity and defense obligations. (See Code Civ. Proc., § 2018.030 [protection against

production of "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories"].) The trial court was within its discretion to rely on the description of those documents provided by counsel rather than conducting an in camera review.

Second, we reject Union Bank's contention Chicago Title and First American/Gallagher did not satisfy the requirement that they "'have in common an interest in securing legal advice related to the same matter — and that the communications be made to advance their shared interest in securing legal advice on that common matter.'" (*OXY Resources, supra*, 115 Cal.App.4th at p. 891.) Specifically, Union Bank points to certain statements made by Gallagher's counsel during the early stages of the litigation, before Chicago Title agreed to defend and indemnify First American and Gallagher, which suggested that Chicago Title was not in agreement with Gallagher and First American as to whether it had an obligation to indemnify them. Union Bank argues that "[t]here was plainly no 'common interest' at that point." Union Bank overlooks the fact that even during the time period when Chicago Title had not yet agreed to indemnify Gallagher and First American, it already had a common interest in defeating Union Bank's claim to have a security interest in the Home under the Third Deed of Trust because it was potentially responsible for that indemnification,

We accordingly conclude that the trial court did not abuse its discretion by granting Gallagher's motion to quash.



## DISPOSITION

We reverse (1) the trial court's order granting summary judgment to Gallagher, and (2) the postjudgment order awarding attorney fees to Gallagher. We affirm the trial court's order granting Gallagher's motion to quash the subpoenas served by Union Bank.

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IRION, J.

WE CONCUR:

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NARES, Acting P. J.

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HALLER, J.